IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-171

FRANKFORD HOSPITAL,
Petitioner

v.

BLUE CROSS OF GREATER PHILADELPHIA,
Respondent

BRIEF IN OPPOSITION FOR RESPONDENT BLUE CROSS OF GREATER PHILADELPHIA

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PRESS OF ALLEN, LANE & SCOTT, INC., PHILADELPHIA

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STATEMENT OF THE CASE

Blue Cross of Greater Philadelphia ("Blue Cross") exists and operates pursuant to the Nonprofit Hospital Plan Act, Act of June 21, 1937, P.L. 1948, § 1, *et seq.*, 40 P.S. § 1401 *et seq.*, as amended (although for present purposes not materially altered) by the Act of Nov. 15, 1972, P.L. 1063, No. 271, 40 Pa. C.S.A. § 6101 *et seq.* Both the original and the amended statutes specifically provide that the rates charged by Blue Cross to its subscribers as well as the rates of payments to hospitals by Blue Cross pursuant to contracts between Blue Cross and hospitals must be approved in advance by the Insurance Department of the Commonwealth of Pennsylvania. Pursuant to this authority, the Pennsylvania Insurance Department has closely and aggressively regulated the contracts entered into between Blue Cross and Philadelphia-area hospitals, including Frankford Hospital.

In accordance with the statutory scheme and unlike profit-making insurance carriers, Blue Cross does not undertake to indemnify its subscribers. Rather, it contracts to provide actual hospital services to its subscribers. It then subcontracts with hospitals to have the hospitals provide the agreed services to its subscribers. The contracts with hospitals set forth the method of reimbursing the hospitals, and must also be approved in advance by the Pennsylvania Insurance Department. (See 40 Pa. C.S.A. § 6124.)[1]

Frankford Hospital (hereinafter "Frankford") is a nonprofit hospital which has for many years contracted with Blue Cross to provide hospital services to Blue Cross subscribers. It contends that it and "virtually all nonprofit hospitals in the Greater Philadelphia area" entered into

[1] Under certain limited circumstances Blue Cross also makes direct indemnity payments to its subscribers.

contracts with Blue Cross effective in 1967 and 1971 only "after long and acrimonious negotiations." (Petition, p. 3.) Further, Frankford alleges that the hospitals did not voluntarily contract with Blue Cross, but were compelled to do so by a boycott and by coercion. (Petition, pp. 6-7.)

Frankford contends that Blue Cross's conduct is violative of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Blue Cross raised as one of its defenses its exemption from the Sherman Act by reason of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. Frankford argues that the McCarran-Ferguson exemption is inapplicable because Blue Cross has engaged in a boycott and in coercive activities. Following completion of discovery and the filing of Pretrial Memoranda, Blue Cross moved for summary judgment on the basis of its McCarran-Ferguson Act defense[2] and Frankford's failure to provide any factual underpinning for its bald allegations of boycott and coercion.

There was no issue of material fact and the District Court found that the challenged conduct of Blue Cross did not constitute boycott, coercion or intimidation. Summary judgment was entered in favor of Blue Cross, 417 F. Supp. 1104 (E.D.Pa. 1976), and the Third Circuit affirmed. 554 F.2d 1253 (3d Cir. 1977).

Although petitioners state as "facts" many matters not of record as well as many matters which are simply incorrect, it is not necessary to this Court's review that such statements be specifically rebutted at this time.

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[2] Summary judgment was also sought on the basis of state action under *Parker* v. *Brown*, 317 U.S. 341 (1943), but neither the District Court nor the Court of Appeals reached that issue.

ARGUMENT

The decision of the Court of Appeals for the Third Circuit does not conflict with any decision of any Court of Appeals.

In an endeavor to have this Court grant certiorari Frankford contends that there is a split among the circuit courts of appeals in interpreting § 1013(b) of the McCarran-Ferguson Act. Assuming *arguendo* that Frankford's position is correct, the Third Circuit's decision in the instant case is in accord with the statutory interpretation which Frankford asks this Court to adopt.

The Third Circuit did not affirm the decision of the District Court on the basis of any "construction"[3] of the McCarran-Ferguson Act, but on the basis of Frankford's failure to set forth any element of boycott, coercion, or intimidation—under any definition of those words—which would preclude application of the McCarran-Ferguson exemption.

Frankford has not cited a single decision of the Third Circuit that construes § 1013(b). None exists. The Third Circuit has never construed that provision. In each of the three decisions under the McCarran-Ferguson Act that are pertinent here,[4] the Third Circuit has rejected allegations made under section 1013(b) as not supported by the evidence presented, or as not legally sufficient. Frankford recognizes this and is forced to contend that the Third Circuit has "implicitly joined the Fifth and Ninth Circuits" and narrowly construed the statute. (Petition, p. 8.)

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[3] "Construction" is used in the sense of going beyond the written text and "interpretation" in the sense of exploring only the written text. *See* BLACK'S LAW DICTIONARY at 386 and 954 (4th ed. 1951).

[4] The decisions in the present action; in *Travelers Insurance Co.* v. *Blue Cross of Western Pennsylvania*, 481 F.2d 80 (3d Cir. 1973), *cert. denied*, 414 U.S. 1093 (1973); and in *Doctors, Inc.* v. *Blue Cross*, ——— F.2d———, 1977-1 Trade Cas. ¶ 61,420 (3d Cir. 1976).

Frankford's position is that there are different interpretations among the circuits of the "boycott, coercion or intimidation" exception to the McCarran-Ferguson exemption. Frankford contends that the Fifth and Ninth Circuits have construed these terms as extending only to boycotts directed against insurance companies and their agents by other insurance companies and their agents. The First, Second, Fourth and District of Columbia Circuits, Frankford argues, have taken a broader view of § 1013(b).

Frankford fails to explain the basis for its conclusion that the Third Circuit "implicitly" has joined the Fifth and Ninth Circuits in narrowly construing § 1013(b). The Third Circuit does not discuss the scope of § 1013(b), but relies on its earlier decision in *Travelers, supra,* which preceded the Fifth and Ninth Circuit decisions (and which was not referred to by those circuits). Further, *Proctor* v. *State Farm Mutual Ins. Co.,* ____ F.2d ____, 1977-1 Trade Cas. ¶61,481 (D.C. Cir. 1977), concludes at 71,867 that the Third Circuit has adopted a broader view of § 1013(b) than have the Fifth and Ninth Circuits, noting that the Third Circuit does not state what it considers the scope of § 1013(b) to be. Not having construed § 1013(b), the Third Circuit cannot be in conflict with other circuits as to its construction.

Frankford's contention that the Third Circuit's decision is based on a narrow construction of section 1013(b) is laid to rest by the District Court's opinion in the present case which declares:

> Assuming *arguendo,* that the term, boycott, in section 1013(b) extends to boycotts of persons other than insurance companies and insurance agents, Frankford Hospital still has not created a triable issue of material fact as to its allegation that Blue Cross has conspired with others or otherwise conducted a boycott of non-member hospitals. (Footnote omitted.) 417 F. Supp. at 1111. (A14-15.)

The District Court's decision then goes on to analyze the factual elements of Frankford's boycott, coercion or intimidation theory and concludes that Frankford failed to establish the necessary elements. Neither the District Court's nor the Third Circuit's decision is dependent upon a narrow construction of the McCarran-Ferguson Act. Frankford's Petition should therefore be denied.

Assuming *arguendo* the existence of a split among some circuits, moreover, the Third Circuit's decision cannot be deemed to be in conflict with any decision of any circuit. Under any construction of § 1013(b) of the McCarran-Ferguson Act, the present case involves no boycott, coercion or intimidation. Nor is this fact lost on Frankford. It does not contend that the conduct of Blue Cross would be deemed to constitute boycott, coercion, or intimidation under the decisions of some other circuit. Indeed, Frankford never advances any definition of boycott, coercion or intimidation. The reason is plain: no definition, interpretation or construction of those terms encompasses the conduct of Blue Cross. Accordingly, Frankford's attempt to exploit what is perceives to be a split among the circuits to obtain review of a case not involved in the alleged split must fail.

An analysis of the decisions cited by Frankford shows clearly that there is no conflict with the decision in the instant case.

Whether the boycott phrase is given a narrow construction limited to insurance companies and insurance agents or a broader one, the courts are agreed that certain types of conduct are within the provision and certain types are not. Frankford cites decisions of the Fifth and Ninth Circuits that adopt the narrow view and decisions of the First, Second, Fourth and District of Columbia Circuits that, it claims, adopt a broader view.

Initially, it is evident that *Monarch Life Insurance Co.* v. *Loyal Protective Life Insurance Co.,* 326 F.2d 841 (2d

Cir. 1963), *cert. denied,* 376 U.S. 952 (1964), cannot be cited as support for the broader construction. The case involved a boycott by one insurance company against another insurance company, thus falling within the narrow view.

Ballard v. *Blue Shield of Southern W. Va.,* 543 F.2d 1075, 1078 (4th Cir. 1976), *cert. denied,* ____ U.S. ____ (1977), does not examine the scope of section 1013(b) but simply determines that the type of conduct described (refusal to extend medical insurance coverage to include services provided by chiropractors) may be in the nature of a boycott. There is no indication that the court even considered that section 1013(b) might have a narrow or a broad construction.

The two remaining decisions, *Barry* v. *St. Paul Fire & Marine Insurance Co.,* 555 F.2d 3, 1977-1 Trade Cas. ¶ 61,431, at 71,593 (1st Cir. 1977), and *Proctor* v. *State Farm Mutual Automobile Insurance Co.,* ____ F.2d ____, 1977-1 Trade Cas. ¶ 61,481, at 71,859 (D.C. Cir. 1977), expressly disagree with the construction stated by the Ninth and Fifth Circuits. In *Barry* the First Circuit read the language of section 1013(b) broadly to apply to alleged concerted refusals by insurance companies to sell policies to customers dissatisfied with the terms offered by their previous insurer. However, the court specifically stated that under the "normal scope" of the boycott provision "[r]egulation by the state would be protected; concerted boycotts against groups of consumers not resting on state authority would have no immunity." 1977-1 Trade Cas. at 71,597. Thus, conduct of an insurance company actually regulated by state authority would not be a boycott within the scope of section 1013(b). The First Circuit's interpretation, while seemingly broad, would not encompass the conduct complained of by Frankford Hospital as conduct within section 1013(b).

In *Proctor* the District of Columbia Circuit also adopted a limited construction of section 1013(b). The court indicated that some conduct beyond a simple rate-fixing agreement would be required to come within section 1013(b), 1977-1 Trade Cas. at 71,869, and generally distinguished "mere cooperation or concert of action" which "merely exerts economic pressure" from "collusive use of power" which prevents policyholders from dealing with sellers of their choice notwithstanding the economic detriment of doing so. *Id.* at 71,870. The court's distinction applies equally to the allegations of Frankford Hospital in that they concerned only economic forces, not prohibitions or restraints on the buyer's freedom to decide.

The results of the similar standards applied in *Barry* and *Proctor* thus reinforce the decision of the Third Circuit in this action, rather than conflict with it.

CONCLUSION

For the reasons set forth above the Petition for Writ of Certiorari should be denied.

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